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State v. Hillbroom Appellant's Reply Brief Dckt. 42816

APPELLANT'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW BY THE SUPREME COURT OF COURT OF APPEALS DECISION

APPEAL FROM THE DISTRICT COURT MAGISTRATE DIVISION,

OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY

HONORABLE DEBRA HEISE PRESIDING

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY

HONORABLE JEFF M. BRUDIE PRESIDING

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF IDAHO

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APPELLANT'S REPLY BRIEF

I. ISSUE ON REVIEW.

In its responsive brief on review, the State contends that the Appellant, Junior Larry Hillbroom ("Hillbroom"), failed to set forth a question presented for review in his Brief in Support of Petition for Review. Respondent's brief, p.2. Hillbroom's brief was not intended to address the merits of the case but rather to address whether this Court should accept review pursuant to criteria set forth in I.A.R. 118(b). Hillbroom set forth a concise statement of the issue on review in his opening brief, which he incorporates herein by reference:

> **Is a no contact order invalid under I.C. § 18-920 where it fails to contain a date certain for expiration?**

Br. of Appellant, p.5.

II. STANDARD OF REVIEW.

Hillbroom agrees with and adopts the standard of review set forth by the State in its Respondent's Brief on Review. Respondent's Br., pp. 3-4.

III. ARGUMENT.

A. An order issued pursuant to I.C. § 18-920 that fails to comply with I.C.R. 46.2 is <u>not</u> a no contact order; it's a plain vanilla court order.

The State argues that a no contact order that fails to comply with the mandatory provisions of I.C.R. 46.2, nonetheless, remains valid under I.C. § 18-920. The State is wrong. The statute and criminal rule must be read together and both must be satisfied in order to obtain a conviction. Contrary to the State's contention, Criminal Rule 46.2 is not inconsistent with the substantive provisions of the statute because I.C.R. 46.2 merely distinguishes a no contact order

punishable under I.C. § 18-920 from a plain vanilla court order, punishable under the contempt statutes. Therefore, the substantive law and the procedural rule are consistent and not in conflict. *See State v. Johnson,* 145 Idaho 970, 974, 188 P.3d 912, 916 (2008) ("When a statute and rule can be reasonably interpreted so that there is no conflict between them, they should be so interpreted rather than interpreted in a way that results in a conflict.") (internal quotations and citations omitted).

This Court has been granted authority to make procedural rules that effectuate the substantive laws of this state. I.C. §§ 1-212, 1-213; *State v. Currington*, 108 Idaho 539, 540-41, 700 P.2d 942, 943-44 (1985). The "line of demarcation" between substantive law and procedural rules has been explained by this Court as follows:

> Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Id. at 541, 700 P.2d at 944 (quoting *State v. Smith,* 84 Wash.2d 498, 527 P.2d 674, 676–77 (1974)).

In this case, I.C. § 18-920 provides the substantive law, to wit: "A no contact order may be imposed by the court or by Idaho criminal rule." I.C. § 18-920(1). A violation of a no contact order is committed when:

> (a) A person has been charged or convicted under any offense defined in subsection (1) of this section; and

The criminal rule uses the words "shall" and "must" in defining a no contact order. The words "shall" and "must" are mandatory. *Twin Falls Cnty. v. Idaho Comm'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012). The word "should" is not mandatory. *Id.*

The State and the lower courts have mistakenly treated Hillbroom's legal argument as promoting the addition of a "new" element to the crime of violation of a no contact order. That is incorrect. Hillbroom argues that implicit in the existing element, "A no contact order has been issued . . ." (I.C. § 18-920(2)(b), is that the order issued by the court be a valid one. Surely the legislature intended that only valid orders be subject to enforcement. However, the statute does not define a no contact order or distinguish the no contact order issued pursuant to I.C. § 18-920 from a general protection order, punishable under I.C. § 39-6312, or from a plain vanilla court order, punishable under the civil and criminal contempt statues, I.C. §§ 7-610, 18-1801. The authority to define the contents of the no contact order was left to this Court by a substantive provision in the statute and by the Court's independent rule making authority under I.C. §§ 1-212, 1-213.

The State urges this Court to ignore the mandatory provisions in the criminal rule that effectuates I.C. § 18-920. In essence, the State reads the words "shall" and "must" as "should," as in, "no contact orders 'should' contain, at a minimum, the following information. . . ." But that is not what the rule says. The rule says a no contact order issued pursuant to I.C. § 18-920 "must" contain, *inter alia*, an expiration date certain. To follow the State's logic to its conclusion, a no contact order would remain valid even if the order was not "in writing," failed

to contain a "distance restriction," or failed to contain or misidentified the "victim's name." All those items are required under the criminal rule but not mentioned in the statute. The State's strained reading of the rule cannot be correct because its reading simply eviscerates the rule, or in legal parlance, renders it mere surplusage.

In a nutshell, an order issued pursuant to I.C. § 18-920 that fails to satisfy the mandatory requirements of I.C.R. 46.2 is NOT A "NO CONTACT ORDER." Rather, it's a plain vanilla court order. There's recent precedence for applying a criminal rule in this way. This Court in *Reed v. Reed*, 157 Idaho 705, 339 P.3d 1109 (2014), *reh'g denied* (Jan. 14, 2015), considered the validity of judgments that failed to strictly comply with I.R.C.P. 54(a). The Court stated: "[T]he purported judgments issued on February 24, 2011, were not judgments, because they did not comply with the rule." *Id.* at ___, 339 P.3rd at 1126. Similarly, the order issued to Hillbroom is not a no contact order because it does not comply with the rule.

B. An offender who violates an invalid no contact order remains subject to a judgment of contempt.

The State argues that a strict application of the I.C.R. 46.2 would permit an offender, who knows the order to be invalid, to contact the victim "without fear of criminal prosecution or other consequence." That is not Hillbroom's legal position. Hillbroom argues there is recourse under the contempt statute for violating a court's order.

The State relies on *In re Contempt of Reeves*, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987) for the proposition that an order that fails to comply with I.R.C. 46.2 remains punishable under I.C. § 18-920 so long as it is not "transparently invalid." Such reliance is misplaced.

Reeves is a case of contempt arising out of a divorce action where the lawyer, Reeves, advised his client to ignore an *ex parte* protective order on grounds that the order failed to comply with the applicable civil rule, I.R.C.P. 65(b). *Id.* at 576, 733 P.2d at 797. I.R.C.P. 65 is the civil rule generally applicable to all injunctions and restraining orders. The *Reeves* court concluded that the *ex parte* protective order, while non-compliant with I.R.C.P. 65(b) was possibly valid because "I.R.C.P. 65(g) stands on its own, and the rule contains no suggestion that it is limited by the protections of Rule 65(b)." *Id.* at 581, 733 P.2d at 802. But, because the *Reeves* court was uncertain as to which rule applied, it adopted a new rule, to wit: "While the validity of the order is a close issue, we believe the order was not so lacking in merit as to be "transparently invalid." *Id.*; *accord Bayes v. State*, 117 Idaho 96, 100, 785 P.2d 660, 664 (Ct. App. 1989).

This Court has not adopted the "transparently invalid" standard. Indeed, it has not been heard from since 1989. This Court may find, consistent with its holding in *Reed v. Reed*, that a valid temporary restraining order must strictly comply with the mandatory requirements of I.R.C.P. 65(b). But, perhaps there is a better analysis that should have been applied in *Reeves* to uphold the judgment of contempt: the legislature set forth the substantive law regarding the power of the trial court to compel obedience to its orders and that power may not be abridged by court rule. Idaho Code § 1-1603 provides that "Every court has the power ... To compel obedience to its judgments, orders and process, and to the orders of a judge out of court in an action or proceeding pending therein." I.C. § 1-1603(4) (emphasis added). Thus, this Court is

without authority to promulgate rules that diminish the statutory enforcement authority granted to "every" court through the contempt statutes. *See State v. Beam,* 121 Idaho 862, 864, 828 P.2d 891, 893 (1992) (statutory provision on time to appeal a death sentence conviction held substantive and precluded discretion granted in criminal rule); see also *Two Jinn, Inc. v. Dist. Court of the Fourth Judicial Dist.*, 150 Idaho 647, 655, 249 P.3d 840, 848 (2011) (court lacked authority to promulgate certain sections of the Bail Bond Guidelines because "they purport to make the bail agent personally liable on the surety bond bail bond.")

The State's reliance on *Reeves* is misplaced because criminal prosecution under I.C. § 18-920 is different than enforcement through a contempt action. If the *ex parte* restraining order enforced in *Reeves* is held invalid, the court is then left without any enforcement authority under its general power to compel obedience to its lawful orders. *See In re Weick*, 142 Idaho 275, 279, 127 P.3d 178, 182 (2005) ("Courts have the contempt power in order to preserve their effectiveness and sustain their inherent and statutory power."). That is not the case with an invalid no contact order. An order found invalid pursuant to I.C. § 18-920 and I.C.R. 46.2, remains punishable under the general contempt power of the issuing court so long as the violation is found to be "willful." *Id.* at 279, 127 P.3d at 182 ("This Court has long recognized implicitly that one's violation of a court order must be willful to justify an order of contempt."). I.C. § 18-105; *State v. Rice*, 145 Idaho 554, 556, 181 P.3d 480, 482 (2008).

Why, one might ask, should an order held invalid as a no contact order remain punishable under the contempt statutes? The reason and the distinction is in the *mens rea* element. Idaho

Code § 18-920 allows a special form of protective order, prosecuted as a separate crime, by a separate court, and most significantly, having no intent element. It is a strict liability offense. Consequently, this Court very carefully set forth the mandatory criteria for a valid no contact order in I.C.R. 46.2. It has repeatedly admonished the trial courts about complying with the rule. *See, e.g., State v. Castro*, 145 Idaho 173, 176, 177 P.3d 387, 390 (2008) ("[W]e expect judges to provide a termination date, regardless of whether the motion to modify or terminate the no contact order is granted").

Thus, because I.C. § 18-920 is a strict liability offense, always punished as a misdemeanor or felony, the State and the magistrate should be held to the same strict standards of compliance as is the defendant. Indeed, one might turn the State's argument back on itself: failure to strictly enforce I.C.R. 46.2 allows the State and the courts to violate the rule with impunity, which up to now they have done!

IV. CONCLUSION

For the foregoing reasons, this Court should remand Hillbroom's case back to the magistrate for dismissal.

RESPECTFULLY SUBMITTED this 23rd day of March, 2015.

BERG & McLAUGHLIN, CHTD

By: _____
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CERTIFICATION OF SERVICE

I hereby certify that on the 24 day of March, 2015, I caused to be served two true and correct copies of the foregoing document by US mail to the following:

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